



Comptroller General
of the United States
Washington, D.C. 20548

John Schaik

149886

Decision

Matter of: Group Technologies Corp.--Reconsideration

File: B-250699.9

Date: August 17, 1993

Alan M. Grayson, Esq., for the protester,
John Van Schaik, Esq., and Robert C. Arsenoff, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Dismissal as untimely of a request for entitlement to protest costs based on agency corrective action is affirmed where the request was filed more than 10 days after the protester was advised of the alleged corrective action, and the protester has presented no evidence that demonstrates that the request was timely filed.

DECISION

Group Technologies Corp. (GTC) requests reconsideration of our decision Group Technologies Corp.--Entitlement to Costs, B-250699.8, Apr. 7, 1993, in which we dismissed as untimely GTC's request for reimbursement of the costs of pursuing its protests which we denied in Group Technologies Corp.; Electrospace Sys., Inc., B-250699 et al., Feb. 17, 1993, 93-1 CPD ¶ 150.

The dismissal is affirmed.

Our decision, Group Technologies Corp.; Electrospace Sys., Inc., supra, concerned a contract awarded to Grumman Aerospace Corporation by the United States Army Communications-Electronics Command (CECOM) for vehicular intercommunications systems (VIS) and a subcontract (also for VIS) awarded to Grumman by the Diesel Division of General Motors of Canada Limited (DDGM), which was the prime contractor under the U.S. Army Tank-Automotive Command's (TACOM) contract to provide Light Armored Vehicles to the Saudi Arabian National Guard (SANG) as a foreign military sale (FMS). After we denied its protests, on February 25, GTC filed a request with our Office under section 21.6(e) of our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1993), for the costs of filing and pursuing the protests. Under that provision, if the contracting agency takes corrective action in response to a protest, we may declare the protester to be

entitled to recover the reasonable costs of filing and pursuing the protest, including attorneys' fees. GTC also requested that we declare it to be entitled to the costs of preparing the proposal which it submitted under the TACOM procurement.

As we explained in our decision dismissing GTC's request, GTC argued in its protest that the Army had violated provisions of the Arms Export Control Act, as amended, 22 U.S.C. §§ 2751 et seq. (1988), and its implementing regulations, Federal Acquisition Regulation (FAR) § 6.302-6(b)(1), by ordering DDGM to award the sole-source subcontract to Grumman. We denied this aspect of GTC's protest since, as required by the Arms Export Control Act and the regulations, the Saudi government, on whose behalf the procurement was conducted, provided "written direction" that the award be made to Grumman. We explained that the "written direction" consisted of an April 24, 1991 Letter of Offer and Acceptance from the Saudi government and a January 4, 1993, letter from the Acting Deputy of SANG, which confirmed the Saudi government's decision to equip its vehicles with Grumman VIS. We also denied GTC's allegation that Grumman obtained an improper competitive advantage under the CECOM procurement as a result of the DDGM subcontract.

In its request for entitlement to protest costs, which it filed on February 25, GTC stated that from the filing of its initial protest on October 2, 1992, until January 4, 1993, the Saudi government had provided no written direction to the Army to award the VIS subcontract to Grumman. GTC argued that the January 4 letter from the Acting Deputy of SANG was the written direction required by the Arms Export Control Act. GTC also argued that the January 4 letter would not have been issued absent the GTC protests and therefore, that letter constituted "corrective action" as contemplated by section 21.6(e) of our Regulations. Thus, according to GTC, in accordance with that provision, it is entitled to the costs of filing and pursuing its protests.

Pursuant to section 21.6(e), we may award protest costs in circumstances where the record shows that the agency acted in violation of statute or regulation and only took corrective action in response to the protest. See Building Servs. Unlimited, Inc.--Claim for Costs, B-243735.3, Aug. 27, 1991, 91-2 CPD ¶ 200. Under section 21.6(e), however, the protester should file its comments concerning whether such costs should be awarded "within 10 days after being advised that the contracting agency has decided to take corrective action." As we explained in our decision dismissing GTC's request for entitlement to costs, GTC received a copy of the January 4 letter on January 7 and first requested entitlement to protest costs based on the

alleged corrective action set forth in that letter on February 25. Since GTC delayed filing its comments with our Office for more than a month, we considered GTC's request for costs to be untimely filed and we declined to consider it. See Moon Eng'g Co., Inc.--Request for Declaration of Entitlement to Costs, B-247053.6, Aug. 27, 1992, 92-2 CPD ¶ 129.

In its request for reconsideration, GTC argues that it filed a timely request for entitlement to protest costs based on the Army's corrective action and requests that we now decide whether it is entitled to such costs. As explained, GTC argued in its February 25 request for entitlement that the January 4 letter from the Acting Deputy of SANG, which confirmed the Saudi government's decision to acquire Grumman VIS, should have been considered "corrective action" in response to GTC protests. GTC now argues, for the first time, that two letters which it submitted to this Office on January 19, 1993--within 10 working days of its receipt of the January 4 SANG letter--should have been understood by this Office to be a request that we declare GTC entitled to the costs of filing and pursuing its protests based on the corrective action which the Army allegedly had taken in response to the protests.

In support of this assertion, GTC notes that one of its January 19 letters stated "[p]erhaps the Army considers this new paperwork [the January 4 letter] to be in the nature of 'corrective action.'" while the other letter, which was in fact an additional protest by GTC, requested proposal preparation costs and protest costs. According to GTC, although the two January 19 letters did not specifically request a declaration of entitlement to costs based on corrective action, "[t]his was the meaning of GTC's request for proposal preparation costs and attorneys' fees, however, and no other meaning may reasonably be attributed to this request."

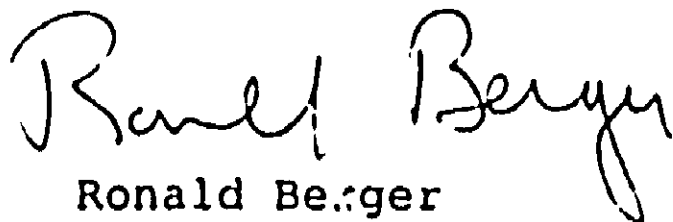
We do not agree. The only request for costs which GTC filed within 10 days after it received the January 4 SANG letter was included in its January 19 protest and that request for costs concerned only the additional protest. Further, with respect to GTC's reference to "corrective action" in the other January 19 letter, as we explained in our April 7 decision dismissing GTC's request for entitlement to costs, that reference was not a request for entitlement based on corrective action since that letter did not mention protest costs in connection with the alleged corrective action.

In addition, we think that the clearest indication that GTC's January 19 letters, either individually or combined, were not intended as a request for protest costs based on corrective action is the fact that GTC filed such a request

at a later date--on February 25. Although GTC now maintains that its February 25 letter simply "renewed" its request for costs as stated in the January 19 letters, this contention is belied by the text of the February 25 letter. That letter did not renew a previous request for costs based on corrective action and in fact did not mention any previous request based on corrective action. Rather, as we stated in our April 7 decision, the February 25 letter, for the first time, requested entitlement to costs based on the alleged corrective action. Under the circumstances, we conclude that GTC's reconsideration request provides no basis for us to reconsider our decision dismissing its request.

In any event, the January 4 SANG letter was not corrective action taken in response to a protest; that is, there is no indication in the record that the agency acted in violation of statute or regulation and subsequently took corrective action because of such a violation. Rather, the agency and the Saudi government simply made decisions as they became necessary during the course of the procurement process. See Racal Filter Technologies, Ltd.--Request for Declaration of Entitlement to Costs, B-244471.5, Apr. 24, 1992, 92-1 CPD ¶ 390. In this respect, as we stated in our earlier decision on GTC's protests: "the record shows that SANG's selection of Grumman was tentative until CECOM selected its VIS contractor and until high temperature testing of the Grumman VIS was successfully completed. After that testing was successfully completed, SANG provided the appropriate written direction to the Army." Group Technologies Corp; Electrospace Sys., Inc., supra. Thus, GTC's protests essentially anticipated improper agency action--the award of a sole-source contract under the foreign military sale program without the written direction from the foreign government required by the Arms Export Control Act. Consequently, there is no basis for the payment of protest costs.¹

The dismissal is affirmed.



Ronald Berger
Associate General Counsel

¹In addition to protest costs, GTC also requests reimbursement of the costs of preparing its proposal submitted in response to the CECOM solicitation. We note that there is no provision for entitlement to such costs when the contracting agency takes corrective action in response to a protest. See 4 C.F.R. § 21.6(e).